A (Really) Brief History of the “Collective” Right to Keep and Bear Arms

FITS ON THE HEAD OF A PIN

America’s 1st Freedom March 2008
Houston v. Moore

The first case in which the Supreme Court mentioned the Second Amendment was Houston v. Moore, in 1821. During the War of 1812, Mr. Houston refused to appear for federal militia duty. He thereby violated a federal statute, as well as a Pennsylvania statute that was a direct copy of the federal statute. When Houston was prosecuted and convicted in a Pennsylvania court martial for violating the Pennsylvania statute, his attorney argued that only the federal government, not Pennsylvania, had the authority to bring a prosecution; the Pennsylvania statute was alleged to be a state infringement of the federal powers over the militia.

When the case reached the Supreme Court, both sides offered extensive arguments over Article I, section 8, clauses 15 and 16 of the Constitution, which grant Congress extensive powers over the militia. Responding to Houston’s argument that congressional power over the national militia is absolute (and therefore Pennsylvania had no authority to punish someone for failing to perform federal militia service), the state’s lawyers retorted that congressional power over the militia was shared with the state power. They pointed to the Tenth Amendment, which reserves to the states all powers not granted to the federal government.

If the purpose of the Second Amendment were to guard state government control over the militia, then the Second Amendment ought to have been the heart of Pennsylvania’s argument. Instead, Pennsylvania resorted to the Tenth Amendment to make the “state’s right” point. Quite plainly, the Pennsylvania government lawyers relied on the Tenth Amendment, rather than the Second, because the Tenth guarantees states’ rights, and the Second guarantees an individual right.

Justice Bushrod Washington delivered the opinion of the court, holding that the Pennsylvania law was constitutional because Congress had not forbidden the states to enact such laws enforcing the federal militia statute.

Justice Joseph Story, a consistent...
supporter of federal government authority, dissented. He argued that
the congressional legislation punishing militia resisters was exclusive, and
left the states no room to act.

Deep in the lengthy dissent, Justice Story raised a hypothetical:
What if Congress had not used its militia powers? If Congress
ignored the militia, could the states act? “Yes,” he answered:
“If, therefore, the present case turned upon the question, whether a state might organize,
arm and discipline its own militia, in the absence of, or
subordinate to, the regulations of congress, I am certainly not prepared
to deny the legitimacy of such an
exercise of authority. It does not seem
repugnant in its nature to the grant of a
like paramount authority to Congress;
and if not, then it is retained by the
states. The Fifth [sic] Amendment to
the constitution, declaring that ‘a well-
regulated militia being necessary to
the security of a free state, the right of
the people to keep and bear arms shall
not be infringed,’ may not, perhaps, be
thought to have any important bearing
on this point. If it have, it confirms and
illustrates, rather than impugns, the
reasoning already suggested.”

After acknowledging that the Second Amendment (mislabeled the “Fifth Amendment” in a typo) was probably irrelevant, Justice Story suggested that to
the extent the Second Amendment did matter, it supported his position.

Justice Story’s dissent is inconsistent with the collective rights theory that the
Second Amendment reduces Congress’s militia powers. Immediately after
the Second Amendment hypothetical, Justice Story stated that if Congress
actually did use its Article I powers
over the militia, then congressional power was exclusive. There could be
no state control, “however small.” If
federal militia powers, when exercised, are absolute, then the collective rights
theory that the Second Amendment
limits federal militia powers is incorrect.

**Scott v. Sandford** In the 1857 *Dred
Scott* case, the Supreme Court ruled
that a free black man could not be
an American citizen. Writing for the
majority, Chief Justice Roger Taney
listed the unacceptable (to him)
consequences of black citizenship: Black
citizens would have the right to enter
any state, to stay there as long as they
pleased, and to go where they wanted
within that state at any hour of the day
or night. Further, black citizens would
have “the right to … full liberty of
speech in public and private upon all
subjects which [a state’s] own citizens
might meet; to hold public meetings
upon political affairs and to keep and
carry arms wherever they went.”

Thus, Chief Justice Taney claimed
that the “right to … keep and carry
arms” (like the “right to … full liberty of
speech,” the right to interstate travel, and
the “right to … hold public meetings on
political affairs”) was a right of American
citizenship. The obvious source of these
rights is the United States Constitution. While the right to travel is not textually
stated in the Constitution, it has been
found there by implication. The rest of
the rights mentioned by the Taney
majority are rephrasings of explicit
rights contained in the Bill of Rights.
Instead of “freedom of speech,” Justice
Taney discussed “liberty of speech,”
instead of the right “peaceably to
assemble,” he discussed the right “to
hold meetings,” and instead of the right
to “keep and bear arms,” he discussed
the right to “keep and carry arms.”

The *Dred Scott* case also held that
Congress had no power to outlaw
slavery in a territory, as Congress had
done in the 1820 Missouri Compromise,
for the future Territory of Nebraska.
Chief Justice Taney’s discussion began
with the universal assumption that the
Bill of Rights limited congressional
legislation in the territories:
“No one, we presume, will contend
that Congress can make any law in a
territory respecting the establishment of
religion, or the free exercise thereof, or
abridging the freedom of speech or of
the press, or the right of the people of
the territory peaceably to assemble and
to petition the government for redress
of grievances. Nor can Congress deny
to the people the right to keep and bear
arms, nor the right to trial by jury, nor
compel anyone to be a witness against
itself in a criminal proceeding.”

From the unanimous agreement
that Congress could not infringe the
Bill of Rights in the territories, Taney
concluded that Congress could not
infringe the property rights of slave
owners by abolishing slavery in
the territories.

The Taney Court obviously

---

**So according to *Cruikshank*, the
individual’s right to arms is protected by
the Second Amendment, but not created
by it, because the right derives from
natural law.**

---

considered the Second Amendment
as one of the constitutional rights
belonging to *individual* Americans. The
“collective rights” Second Amendment
could have no application in a territory,
since a territorial government is by
definition not a state government. And
since Chief Justice Taney was discussing
individual rights that Congress could
not infringe, the only reasonable way
to read the chief justice’s quote of the
Second Amendment is as a reference to
an *individual* right.

**United States v. *Cruikshank*** An important
part of Congress’s work during
Reconstruction was the Enforcement
Acts, which criminalized private
conspiracies to violate civil rights.
Among the civil rights violations that
especially concerned Congress was the
disarmament of Freedmen by the Ku
Klux Klan and similar gangs.

After white rioters burned down a
Louisiana courthouse that was occupied
by a group of armed blacks (following
the Second Amendment, but not created by it, because the right derives from natural law. The Second Amendment protects that right only against violations by the federal government (and federal entities such as the District of Columbia), but not against violations by private citizens.

Presser v. Illinois In the late 19th century, many state governments violently suppressed peaceful attempts by workingmen to unionize. In response, some workers created self-defense organizations. Consequently, some state governments, such as Illinois, responded with laws against armed public parades.

Defying the Illinois law, an organization of German working-class immigrants held a parade in which one of the leaders carried an unloaded rifle. At trial, the leader—Herman Presser—argued that the Illinois law violated the Second Amendment.

In 1886, the Supreme Court ruled against him unanimously. First, said the court, the Illinois ban on armed parades “does not infringe the right of the people to keep and bear arms.” This holding was consistent with traditional common law boundaries on the right to arms, which prohibited terrifyingly large assemblies of armed men.

Further, the Second Amendment by its own force is “a limitation only upon the power of Congress and the national government, and not upon that of the states” (Twentieth century cases have abandoned this view with respect to most other provisions of the Bill of Rights.)

Logan v. United States In Logan, a mob had kidnapped a group of prisoners being held in the custody of federal law enforcement. The issue before the court in 1892 was whether the prisoners, by action of the mob, had been deprived of any of their federal civil rights.

The court held that there had been no deprivation of federal civil rights, because the mob consisted of private persons, not government officials. The court explicitly relied on the Cruikshank ruling, and explained again that the First and Second amendments both recognize preexisting fundamental individual human rights, rather than creating new rights. Both amendments should be interpreted similarly, and both amendments protect persons from government action, but not from private action. The Logan case thus reinforces the principle from Cruikshank that the Second Amendment is an individual right comparable to the First Amendment.

Miller v. Texas Franklin P. Miller was a white man in Dallas who fell in love with a black woman. In response to a rumor that Miller was unlawfully carrying a handgun, a gang of Dallas police officers, after some hard drinking at a local tavern, invaded Miller’s store with guns drawn. A shoot-out ensued, and the evidence was conflicting as to who fired first, and whether Miller

Want More Proof? In fact, the Supreme Court also viewed the Second Amendment as an individual right in several 20th century cases. For a complete rundown of those rulings, see Kopel’s 2003 feature story “The Supreme Court and the Second Amendment,” now online at www.nranews.com.
realized that the invaders were police officers. Miller killed one of the intruders during the shoot-out.

During Miller’s murder trial, the prosecutor asserted to the jury that Miller had been carrying a gun illegally. Upon conviction of murdering the police officer, Miller appealed, and his case reached the Supreme Court in 1894. He claimed that the Second Amendment negated the Texas statute against concealed carrying of a weapon.

The Supreme Court unanimously disagreed: A “state law forbidding the carrying of dangerous weapons on the person … does not abridge the privileges or immunities of citizens of the United States.” Moreover, as in the Presser case, the Second Amendment, like the rest of the Bill of Rights, only operated directly on the federal government, and not on the states: “[T]he restrictions of these amendments (Second, Fourth and Fifth) operate only upon the federal power.”

In other words, the court said that the Second Amendment was just like the First, Fourth and Fifth amendments: an individual right that contained certain implicit exceptions.

Robertson v. Baldwin In 1897, the Supreme Court refused to apply the Thirteenth Amendment (forbidding slavery) to merchant seamen who had jumped ship, been caught and been impressed back into maritime service without due process. The court explained that the Thirteenth Amendment’s ban on involuntaryservitude, even though absolute on its face, contained various implicit exceptions. In support of the finding of an exception to the Thirteenth Amendment, the court argued that the Bill of Rights also contained unstated exceptions:

“The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which from time immemorial had been subject to certain well-recognized exceptions.
arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (Article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (Article 2) is not infringed by law prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (Article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or the verdict was set aside upon the defendant’s motion … Likewise, the self-incrimination clause did not bar a person from being compelled to testify against himself if he were immune from prosecution; and the confrontation clause did not bar the admission of dying declarations.”

In other words, the court said that the Second Amendment was just like the First, Fourth and Fifth amendments: an individual right that contained certain implicit exceptions. Just as libel was not protected by the First Amendment, concealed carry was not protected by the Second Amendment. However, both rights clearly belong to individuals. And because militiamen carry their weapons openly, rather than concealed, the fact that the Robertson court felt a need to carve out a concealed carry exception to the Second Amendment shows that the individual right protects all citizens, and is not limited solely to militiamen on duty.

All of the Supreme Court’s 19th century cases involving the Second Amendment treated the amendment as an individual right—which protected citizens from being disarmed by the federal government while allowing restrictions on the carrying of firearms in public places.

That’s probably not something you’ll hear on this evening’s news. 😊